

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
v.) Crim. No. 93-0006-B
)
ROBERT EARL QUIRION,)
)
 Defendant)

RECOMMENDED DECISION

Defendant has filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. In the Motion, he alleges that his conviction for aggravated, or armed, bank robbery, in violation of 18 U.S.C. § 2113(d), is invalid in light of the recent United States Supreme Court decision in *Bailey v. United States*, 116 S. Ct. 501 (1995). Specifically, Defendant argues that “use of a dangerous weapon” for purposes of section 2113(d) is defined, under *Bailey*, as “active employment” of the weapon. *Bailey*, 116 S. Ct. at 506.

The Government opposes the Motion on the grounds that *Bailey* purported to define “use” for purposes of 18 U.S.C. § 924(c)(1). Accordingly, it does not apply to this case. In the alternative, the Government argues that Defendant’s conduct with the firearm in this case constitutes “use” within the meaning of *Bailey*.

The Court agrees that Defendant “used” the weapon under the definition set forth in *Bailey*. Accordingly, it is not necessary to analyze whether the *Bailey* definition would apply to section 2113(d).¹

¹ The Court is nevertheless inclined to agree with the Government that *Bailey* is not relevant to an interpretation of 18 U.S.C. § 2113. In particular, we are persuaded by those courts which have determined that a defendant may be charged under both sections 2113(d) and 924(c) without

In *Bailey*, the Court stated that “[t]he active-employment understanding of “use” certainly includes brandishing, [and] displaying,” *Id.* at 508. The Court added: “[i]n our view, . . . [i]f the gun is not *disclosed* or mentioned by the offender, it is not actively employed, and it is not “used.” *Id.* (emphasis added). In this case, Defendant acknowledges that he displayed a firearm to the bank teller from whom he demanded money. Terison Aff., Ex. A at 3-4. He further indicates that he had his hand on the weapon, although he states that he did not verbally threaten to use it. *Id.* It is clear from these facts that Defendant “used” the firearm under the definition enunciated in *Bailey*. Accordingly, he is not entitled to relief on this Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255.

Conclusion

For the foregoing reasons, I hereby recommend the Motion to Vacate, Set Aside or Correct Sentence be DENIED in its entirety.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

implicating double jeopardy concerns. In reaching this conclusion, the courts have noted that the elements of each crime are necessarily different. One court specifically stated: “The statutory element of 18 U.S.C. § 924 (c) not part of § 2113 (a) and (d) is the *use* or carriage of a firearm.” *United States v. Foreman*, 914 F. Supp. 385, 387 (C.D. Cal. 1996) (quoting *United States v. Gonzalez*, 800 F.2d 895, 898 (9th Cir. 1986)) (emphasis added).

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on June 17, 1996.